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No. 89-455

In the Supreme Court of the United States

OCTOBER TERM, 1989

RONALD V. CLOUD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's order, pursuant to the Victim and Witness Protection Act (18 U.S.C. 3663-3664 (Supp. IV 1986)), that petitioner make restitution to the insurer of the bank victimized by petitioner's crimes was precluded by petitioner's settlement agreement with the bank and by the bank's settlement agreement with the insurer.

2. Whether there was sufficient evidence to sustain petitioner's convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 872 F.2d 846.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1989. A petition for rehearing was denied on July 17, 1989. The petition for a writ of certiorari was filed on September 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was con-

victed of aiding and abetting bank fraud (18 U.S.C. 1344 (Supp. IV 1986)), and of conspiring to commit bank fraud (18 U.S.C. 371).[1] He was sentenced to five years' probation and a $500,000 fine and was ordered to pay $7.5 million in restitution to the insurance company that compensated the victim of the fraud. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. 1a-26a.

1. The evidence at trial is summarized in the opinion of the court of appeals. Pet. App. 5a-9a. It showed that petitioner and co-conspirator Jon R. Perroton submitted false information to the Hibernia Bank to obtain loan proceeds for Perroton's purchase of the Cal-Neva Lodge from petitioner. The submission to Hibernia inflated the purchase price of the lodge and falsely claimed that Perroton had made a down payment on the transaction.

Petitioner, a sophisticated businessman and real estate investor, purchased the Cal-Neva Lodge, a hotel and gambling casino complex in the Lake Tahoe, Nevada, area, in July 1980. Petitioner and his wife paid $10 million for the lodge, most of which was financed through two mortgages. After three years of increasing operating losses, petitioner closed the lodge in October 1983 and began to seek a new buyer. Pet. App. 5a-6a.

In December 1984, petitioner met with Perroton for the first time. The two men orally agreed that Perroton would purchase the lodge for $18 million, but petitioner refused to sign any documents at that time. On January 2, 1985, Perroton went to the Hibernia Bank to secure a loan for the purchase of the lodge. During the course of that meeting and in subsequent discussions, Perroton made a number of false representations and submitted falsified documents, including a forged sales agreement. Among the false state-

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[1] A third count, charging misprision of felony (18 U.S.C. 4), was dismissed by the government prior to trial.

ments were Perroton's representations that the purchase price was $27.5 million, and that Perroton had already paid $7.5 million to petitioner as a down payment. On January 8, the Transamerica Title Company opened an escrow account for the purchase; Perroton made similar misrepresentations to escrow officer Mickey Eakin. On January 9, Hibernia approved a $20 million loan to Perroton. Two days later, Hibernia prepared $20 million in cashier's checks and directed that they be held by Eakin until the close of escrow. Pet. App. 6a-7a.

Petitioner and Perroton, meanwhile, met again briefly on January 9; they agreed to reduce the actual purchase price from $18,000,000 to $17,030,000. Petitioner spoke to escrow officer Eakin several times before the closing on January 15. On that day, petitioner—along with his lawyer and his son—met with Perroton and his partner in a conference room at the Transamerica offices; Eakin was not present during the meeting. In the course of the meeting, according to testimony at trial, petitioner noticed that the sale price was listed as $27.5 million, that a down payment of $7.5 million was listed, and that the loan from Hibernia exceeded the actual purchase price by almost $3 million. Pet. App. 8a. After the meeting, without explanation, petitioner's lawyer asked Eakin to add the following language to the escrow instructions: "Seller to net the sum of $17,030,000 plus or minus the proration of taxes and bonds and less the first and second trust deeds." Despite this addition, the escrow documents continued to state that the selling price was $27.5 million and that Perroton had made a $7.5 million down payment. Petitioner signed the documents, later had his wife sign them, and delivered the signed documents to the title company. Pet. App. 7a-8a.

On January 23, 1985, the purchase went through. After receiving authorization from Hibernia, Eakin disbursed the $20 million loan proceeds and prepared a settlement state-

ment that reflected the claimed $27.5 million purchase price and $7.5 million down payment. Eakin issued two checks to petitioner—one to him personally for more than $10 million and one to his mortgagees for close to $7 million. Pet. App. 8a-9a.

Perroton later defaulted on the loan, resulting in more than $24.5 million in claimed losses to Hibernia. Hibernia recovered almost all of its losses from its insurer, from the sale of the property, and from settlements with petitioner, Perroton, and the law firm that prepared its escrow analysis. Pet. App. 9a & n.3.

2. On appeal, petitioner argued that the evidence was insufficient to sustain his convictions for conspiracy to commit bank fraud and aiding and abetting bank fraud, and that the district court erroneously ordered him to pay $7.5 million in restitution to the insurance company that had paid that amount to Hibernia. The court of appeals rejected both claims.

Regarding the sufficiency of the evidence, the court first determined that the evidence established that petitioner aided and abetted Perroton's fraudulent scheme to obtain money from Hibernia. The court concluded that a reasonable jury could have found that petitioner joined the scheme at least by the conclusion of the January 15 meeting. Pet. App. 11a. At that point, according to the court of appeals, petitioner knew the actual purchase price was not $27.5 million and that he had not been paid $7.5 million outside of escrow. Although the escrow documents reflected those figures, petitioner did not correct the false sales figures. In the court's view, a reasonable jury could have found that petitioner's modification of the escrow documents actually appeared to confirm the accuracy of the sales figures, thereby aiding Perroton's scheme. Pet. App. 11a-13a.

The court reached the same conclusion with respect to petitioner's conspiracy conviction. Pet. App. 14a-16a. The court found that a rational jury could have concluded that at the January 15 meeting, petitioner and Perroton agreed to commit bank fraud. The jury could have reasonably determined that petitioner, Perroton, and their associates "discussed the discrepancy between the true sale price and down-payment figures and those appearing on the escrow instructions," and that petitioner's act of signing the escrow documents after emerging from the meeting demonstrated that petitioner and Perroton "came to a 'meeting of the minds' to go forward with the Cal-Neva deal using falsified documents to memorialize the transaction." Pet. App. 15a.

The court also rejected the challenge to the district court's restitution order. Pet. App. 16a-20a. Petitioner argued that, because he had entered into a $1.5 million settlement with Hibernia, and because Hibernia had entered into a $7.5 million settlement with its insurer (Continental Insurance Company), those agreements precluded any further payments by him to Continental. Petitioner claimed that the insurer, by entering into the settlement agreement, waived its right to restitution under the Victim and Witness Protection Act (VWPA). The court of appeals rejected that argument (*id.* at 16a-20a), holding that the VWPA did not vest a "right" to restitution in the victim, and thus that Continental, the insurer, "did not waive either a direct or subrogation right to receive VWPA restitution when it settled Hibernia's claim of loss." *Id.* at 20a. In so holding, the court of appeals rejected contrary dicta in *United States* v. *Bruchey*, 810 F.2d 456, 460 (4th Cir. 1987), as "ill-advised." Pet. App. 18a.[2]

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[2] The court emphasized that the VWPA does not permit a victim

ARGUMENT

1. Petitioner contends (Pet. 10-19) that his settlement agreement with Hibernia, and its settlement agreement with its insurer, precluded the district court from entering an order of restitution.

Under the VWPA, a district court may not order restitution when the victim has received compensation for that loss, "except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation." 18 U.S.C. 3663(e)(1) (Supp. IV 1986). This provision authorizes awarding restitution to insurance companies that have compensated the direct victims of criminal offenses. *United States* v. *Youpee*, 836 F.2d 1181, 1184 (9th Cir. 1988); *United States* v. *Durham*, 755 F.2d 511, 513 (6th Cir. 1985).

Petitioner maintains that the district court's restitution order was nevertheless precluded by the settlement agreements. He advances two principal reasons. First, he places extensive reliance (Pet. 14-16) on *United States* v. *Bruchey*, 810 F.2d 456 (4th Cir. 1987), and asserts that a conflict between *Bruchey* and the decision in this case warrants review. Second, he maintains (Pet. 10-14, 16-19) that the VWPA should be read to bar restitution after settlement agreements. Neither argument is well founded.

As the court of appeals determined (Pet. App. 18a), the statements in *Bruchey* on which petitioner relies are dicta wholly unnecessary to that court's decision. In *Bruchey*, the defendant and the victim bank, through a local bank of-

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to obtain a double recovery for injuries or losses suffered from an offense. Pet. App. 20a n.10.

The court of appeals also rejected petitioner's claims that the restitution order was excessive (Pet. App. 20a-25a), and that the order should abate in the event of his death (*id.* at 25a-26a). Petitioner does not renew those claims in this Court.

ficial, entered into an agreement, in the form of a promissory note, after the district court had imposed a restitution order. After the bank repudiated the agreement on the ground that the local official did not have authority to enter into it, the district court summoned the defendant, ordered her to sign a modified agreement proposed by the bank, and entered the terms of the modified agreement as an order of the court. 810 F.2d at 457-458. When the defendant challenged that order, the Fourth Circuit held that it was invalid because "[t]he victim and defendant never 'agreed' on the terms of a promissory note and we conclude that the district court should not compel a defendant to sign such an 'agreement.' " *Id.* at 459. The court also held that the district court had committed two separate errors: it failed to make specific factual findings under the VWPA, and it imposed restitution beyond the period permitted by the statute. *Id.* at 458-459. In dictum, the court went on to say that a district court could take into consideration a voluntary agreement between a victim and a defendant, and that "such a voluntarily executed agreement constitutes *full and immediate restitution*—fully settling the victim's claim against the defendant. The district court, once it found that the agreement had been reached, would have no further role to play under the VWPA." *Id.* at 460 (emphasis in original).

As the court below observed (Pet. App. 18a & n.8), the existence of the promissory note was not material to the Fourth Circuit's decision because the other errors of the district court required reversal independent of the terms of the note. In view of the district court's order in that case, moreover, *Bruchey* itself clearly did not involve a voluntary settlement agreement. Hence, the Fourth Circuit's statement about the effect of a voluntary settlement agreement was unnecessary to its decision, and no court, including the Fourth Circuit, has actually enforced that dicta. Accordingly, *Bruchey* provides weak authority for petitioner's con-

tention, and the asserted conflict with the decision here does not warrant review.[3]

Petitioner's statutory argument is equally unsound. The court of appeals correctly concluded that the district court's jurisdiction to enter a restitution order is applicable regardless of a settlement agreement because the purpose of restitution is penal as well as remedial. Pet. App. 19a (citing *Kelly* v. *Robinson*, 479 U.S. 36, 52 & 53 n.14 (1986)). The Ninth Circuit's view of the purpose of the statute accords with that of other courts. See, *e.g.*, *United States* v. *Satterfield*, 743 F.2d 827, 836-837 (11th Cir. 1984), cert. denied, 471 U.S. 1117 (1985). That a victim may enforce an actual restitution award, after it is ordered by the district court, through civil process (Pet. 16-17; 18 U.S.C. 3663 (h) (Supp. IV 1986)), does not suggest that a settlement agreement divests a court of this penal authority, or bars the court from exercising it. Petitioner's argument requires creating an exception to the district court's explicit authority that the statute itself does not contemplate.[4]

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[3] An additional distinction between *Bruchey* and this case is that petitioner was ordered to pay restitution to the insurer of the victim for the amount that the insurer itself lost as a result of petitioner's crimes, and petitioner raises the agreement between the insurer and the bank as a bar to the district court's restitution jurisdiction.

[4] Petitioner argues (Pet. 17-19) that permitting settlement agreements to bar the exercise of the district court's restitution authority would be good policy. Even if such a policy argument were permitted by the terms of the statute, it would not be persuasive. As the court of appeals held (Pet. App. 20a n.10), settlement agreements should be considered by the district court as one of a number of factors in determining restitution, and the statute itself bars double recovery (18 U.S.C. 3663(e)(1) and (2) (Supp. IV 1986)). Thus, settlement agreements play a significant role in the restitution determination, but they do not have the absolute preclusive effect urged by petitioner.

Contrary to petitioner's suggestion (Pet. 16-17), moreover, the question whether restitution is a "debt" under the Bankruptcy Code (see

2. Petitioner also argues (Pet. 19-23) that there was insufficient evidence to establish that he was a knowing and willful participant in Perroton's scheme to defraud Hibernia Bank. Petitioner does not assert that Perroton did not commit fraud; rather, petitioner argues that he did not participate in that scheme. Both courts below rejected this fact-bound claim, and that determination does not warrant further review.

In this Court, petitioner merely restates the argument that he did not enter into an agreement with Perroton, and that petitioner's amendment of the closing statement establishes his innocence. Contrary to petitioner's contentions, as the court of appeals found (Pet. App. 11a-16a), there was sufficient evidence from which a reasonable jury could have found petitioner guilty beyond a reasonable doubt. Petitioner failed to reveal to the bank or to the closing company the actual purchase price of the lodge and the fact that Perroton had not given him a down payment, and petitioner signed documents containing the false information. Petitioner's reliance on his amendment of the documents to reflect his "net" receipt from the transaction is misplaced. As the court of appeals observed (*id.* at 12a-13a), "[f]ar from correcting any possible misrepresentation as to the sale price, the modification indicating that [petitioner] was to 'net' $17 million reasonably could be construed as *confirming* that the 'gross' sale price actually was the higher $27.5 million figure." Petitioner's modification to the escrow documents, moreover, did nothing to correct the misrepresentation that

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In re Johnson-Allen, 871 F.2d 421 (3d Cir. 1989), cert. granted *sub nom. Pennsylvania* v. *Davenport*, No. 89-156 (Oct. 2, 1989)), does not bear on the preclusive effect of settlement agreements. The effect of settlement awards on the district court's restitution authority does not require an interpretation of the Bankruptcy Code, and the analysis of the Bankruptcy Code, in turn, does not require consideration of the effect of settlement awards on the district court's restitution authority.

he had received a down payment outside of escrow. *Ibid.* Since petitioner signed the modified documents after meeting with Perroton and discussing a discrepancy in the figures, the jury could reasonably have found that petitioner agreed to further Perroton's scheme to defraud the bank, and that he actively aided and abetted that fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00608